"FINALLY, THERE IS ONE PLACE TO GO FOR ALL THE ANSWERS."
—GEOFFREY GILMORE, Director of Film Festival, Sundance Institute

# CLEARANCE COPYRIGHT

*Everything the Independent Filmmaker Needs to Know*

**2nd Edition ■ Revised, Updated & Expanded**

BY MICHAEL C. DONALDSON

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individuals have the right to insist on accuracy and the right to prevent the commercial exploitation of their names or likenesses.

Fictional films usually do not run afoul of the rules about the rights of publicity and privacy, unless they identify a real person in their films. That is why script-clearance procedures are so important. Through those procedures, you learn if you are inadvertently identifying a living person, and, if you are, you can change the name of the character before you start shooting. See Chapter 14 to learn more about script clearance.

Producers of fact-based films—such as documentaries, biopics (biographical motion pictures based on the life of a famous person, living or dead), or historical films—need to be very aware of the rights of individuals.

## Right of Privacy

The **Right of Privacy** is an individual's right to be left alone. This is the personal right that a filmmaker is most likely to invade innocently. Intent is not considered by courts in this case. It doesn't matter who you were aiming at, it only matters who you hit. If you violate someone's right of privacy, your innocent state of mind is of no help in avoiding liability. It may reduce what you owe, but you will still owe something.

The Right of Privacy can take several forms. For your purposes, it covers several traditional items: You cannot "out" someone in any way. You cannot reveal the private facts of someone's life. You cannot intrude into someone's private space in the course of your filmmaking. These activities invade someone's right of privacy.

Everyone has a bubble of privacy around them. That privacy bubble can be burst in various ways. One is the disclosure of private facts. Not lies. Not distortions. Facts. These private facts, however, must be of a kind that, when disclosed without permission, would be highly offensive to a hypothetical ordinary and reasonable person—you know, the kind that exists nowhere except in the minds of judges and the high-priced lawyers who try to persuade them. There is no interest in "protecting any shrinking soul who is abnormally sensitive about such publicity."

So I went in search of the cases that could show us fact situations that did and did not qualify as "highly offensive" (not just slightly offensive) to the masters of our litigation fates. I think I have a feel for what some judges are thinking, but I offer no guarantees—and there is no clear and simple way to describe the definitional watershed. Probably the simplest way to express the demarcation of "offensive" is to say that you should be highly sensitive to religion, sex, and politics, that is, views on matters of social importance. Why? Because that is where normal people are sensitive and that is where lawsuits are spawned and that is where filmmakers most commonly lose.

Since the right of privacy protection slams hard into the First Amendment right of free speech, free press, and the public's right to know, there is a well known exception: If the matter is of public interest, you can reveal it. There is something intuitive about all of this. If a congressman is diddling an intern, that is of public interest and can be mentioned, even though an office affair between consenting adults in a nongovernmental workplace would probably not be fair game. In practice, the courts have stripped elected officials of virtually all of their privacy rights based on the public's right to know.

Crimes are always reportable. However, the California Supreme Court has explicitly held an exception to that for stories about former criminals who have long been rehabilitated and are living a life of quiet obscurity. The U.S. Supreme Court said something very similar: "The ordinary citizen surely has a similar privacy interest in the aspects of his or her criminal history that may have been wholly forgotten."

An Illinois federal court reached a contrary result in a case in which all of the facts that were revealed were in the public court records.

Producers of documentaries and magazine shows on television are most likely to run afoul of someone's right of privacy, but the producer of a fictional film could do the same thing in a two-step

## DEFAMATION: LIBEL AND SLANDER

**Defamation** is the publication of anything false which is injurious to the reputation of another or which tends to bring them disrepute. A defamation designed to be read is **libel**. An oral defamation is **slander**.

Growing up, we all learned that it is not nice to tell lies. When the lies are about other people, they can cost you big bucks.

As a filmmaker, libel and slander issues do not come up often unless you are making a documentary or a biopic, or some other type of film that is offered up as a truthful version of the facts. Television movies often wander into this territory.

If you are offering your film as truthful, you want to have double sourcing on everything. **Double sourcing** simply means that you have two separate and independent sources for each factual assertion in your script. This is especially important for anything that might offend anyone, but especially the subject of the remark or representation. The second source should be truly independent of the first source. For instance, two different newspaper articles written from the same press conference or press release is not really a double source. The same fact verified by a second person not at the press conference would be a double source.

### False Light

It used to be that the law only punished lies that damaged a person. Clint Eastwood fought one of his many battles with one of the grocery-store tabloids. *The Star* reported that he was romantically linked with someone other than the woman he had been involved with for many years. It was untrue. Everyone in Clint's life knew that it was untrue. On the face of it, this created a "no harm, no foul" situation. Clint felt deeply wronged by this false report.

He sued.

He won.

The courts created a new tort called false light. **False light** means that the statements were not true and caused some harm or embarrassment to Eastwood. In this situation, he was falsely reported to be dating someone else. Because he was a public figure, the court said that he had to show that there was gross negligence in their reporting of the situation. The rest of us only have to prove ordinary negligence.

Even if you are making a documentary and you accurately depict a person in context, you can still put them in false light in the editing room. Consider Michael Moore, whose *Roger & Me* offered many a good laugh. Unfortunately, some of those laughs were at the expense of certain persons who thought that the humor came from putting them in a false light. Remember the scene shot at the Great Gatsby Garden Party? One guest came off as an arch-conservative, insensitive to the evicted. In actuality, he was the liberal chairman of the Democratic Central Committee and had helped Michael in the past.

He sued.

The jury agreed with him. The jury found that Michael Moore had put the plaintiff in a false light. Michael didn't feel the need to obtain a formal release to use the man in the documentary because the man knew Michael, knew about the documentary, and consented to be in it. Everything would have been fine, but the way the film was edited put this man in a false light. Michael needs all the protective language he can get to protect against false light claims.

## Defenses to Defamation and False Light

There are a number of common defenses to a suit for defamation. None of them is as good as never getting sued in the first place. Be careful when you make statements about individuals who are living and identifiable.

**Truth:** This is the classic defense. Everybody seems to know that truth is a defense. Even if a statement is not completely true, you should win with a public figure if you have checked the facts out and you have a reasonable basis for believing they are true. Unfortunately for you, reasonable people may differ on what amounts to a reasonable basis for believing anything. Check the facts carefully. Double source any dubious or inflammatory claims.

# AFFIDAVIT OF ELLEN JOHNSTON

STATE OF MISSISSIPPI

COUNTY OF Coahoma

THIS DAY personally appeared before me the undersigned authority in and for the aforesaid County and State, ELLEN JOHNSTON, having been by me first duly sworn upon her oath states as follows:

1. I am above the age of twenty-one (21), not a convicted felon, and competent to testify in this matter.

2. The matters stated herein are based on my personal knowledge.

3. I am a resident citizen of Clarksdale, Coahoma County, Mississippi.

4. On the date of July 10, 2005, I attended a camp meeting at the United Pentecostal Church Campground in Jackson, Mississippi.

5. I am not a public figure; I am a housewife.

6. I have lived in Clarksdale, Mississippi for 10 years.

7. I am presently 51 years of age.

8. I am married to Fred Johnston who is the pastor of the United Pentecostal Church.

9. I am an actively practicing member of the Pentecostal Church and have been since I was 15 years of age.

10. I had no knowledge of a movie called "*Borat*", until I was contacted by my son who saw me in the movie and asked me questions about my participation in this mockery of my religion. I remember his reaction to be that of being appalled at my appearance in this movie.

11. The information contained herein is true and accurate to the best of my knowledge, information and belief.

AND FURTHER THE AFFIANT SAYETH NOT.

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Ellen Johnston
ELLEN JOHNSTON

SWORN to and subscribed before me this the 25th day of June, 2007.

Carol Edwards
NOTARY PUBLIC

MY COMMISSION EXPIRES:
8/20/2010

**AFFIDAVIT OF CRAIG JOHNSTON**

STATE OF TEXAS

COUNTY OF Tarrant

THIS DAY personally appeared before me the undersigned authority in and for the aforesaid County and State, CRAIG JOHNSTON, having been by me first duly sworn upon his oath states as follows:

1. I am above the age of twenty-one (21), not a convicted felon, and competent to testify in this matter.

2. The matters stated herein are based on my personal knowledge.

3. I am a resident citizen of Dallas, Dallas County, Texas.

4. I saw the movie *Borat* in the theater with some of my friends in Texas.

5. When watching the movie, I instantly recognized the campground in Jackson, Mississippi where the scene showing my mother was filmed.

6. I was shocked and immediately screamed out in the theater, "Oh my God, that's my mother" when she appeared on screen.

7. When I called my mother to tell her I saw her in the movie *Borat*, I said, "Mom will never believe this! You are in an "R" rated movie being played around the world." to which my mother replied, "You're kidding, right?" When I told her no she became very upset as I described the nature of the film and its content. Then she said, "What kind of reflection will this have on your father and I?" I was embarrassed for them and the onslaught of sneering and embarrassing moments that will continue to come from now on. I was embarrassed and humiliated myself - being their son - having gone with a friend to the theater myself and seeing my mother in front of me on screen.

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8. I know my mother to be a deeply religious person, who does not even own a television.

9. The information contained herein is true and accurate to the best of my knowledge, information and belief.

AND FURTHER THE AFFIANT SAYETH NOT

CRAIG JOHNSTON

SWORN to and subscribed before me this the 3rd day of July, 2007

NOTARY PUBLIC

MY COMMISSION EXPIRES:

JAMES ANTHONY YOUNG
My Commission Expires
March 29, 2011

File: Johnston/P.I.
"Talking to the Real Sacha Baron Cohen"
Aired on: March 30, 2007

EXCERPT RE: SCENE IN CHURCH

TG: This is Fresh Air. I'm Terry Gross back with Sacha Baron Cohen the actor and writer behind the character Borat. The movie *Borat* has come out on DVD. Baron Cohen also created the character of Ali G, a hip hop wannabe who hosts his own interview show. The Ali G show ran for two seasons on HBO. There is a scene in a uh, uh evangelical church in which as Borat you are saved and people are praying over you and they're speaking in tongues and present at the church are both a congressman and a State Supreme Court Chief Justice. Um, this struck me as one of the most unusual scenes I have ever seen in movies, (laugh) here you are a Jewish actor in character as this caustic anti-Semite who is in this church getting saved. And of course nobody in this church seems to know that you're an actor doing all of this. So, um, there's, I, I, don't know where to start uh, let's start with was it uncomfortable for you impersonating somebody who is Christian and getting saved in a church and having people really kind of praying for you, um...

SBC: I mean the interesting thing about that scene was that it worked exactly as we needed it to work. Um, because essentially the film was very experimental. We have two things that we have to accomplish in each scene. Each scene has to be funny but we also have to achieve a certain story beat that you have to push the story forward and that really had never been really been done before in a movie. And, so, in that particular scene Borat was at his lowest point. He starts the scene at his lowest point ever. Uh, you know he is contemplating suicide, he's almost killed himself the night before, he decides not to kill his chicken. He has given up on his dream of marrying Pamela Anderson after finding out that she is no longer a virgin and you know he really is at his lowest point ever. And so we needed a scene where you know leave the end of act two and emerge into act three reinvigorated and full of life and with this renewed sense of purpose and uh a renewed mission to actually wed and bed Pamela Anderson, and the church was the perfect opportunity to do that.

TG: Well, what, what do the people in the church know when you got there? Or typically what do people know? What kind of release form do you give them? What does the crew tell them about what to expect?

SBC: They were told that um there is a foreign journalist who is coming to do a piece on, on you know that particular church, and he is at a low point in his life and he has had a particularly tough time while crossing America and he might be looking for some kind of spiritual salvation.

TG: Do people ever feel betrayed afterwards when they see what the film really is?

SBC: Um, I think most people don't. I think 99% of people don't. Um, you know a lot of them hear about it and I've obviously been doing this for many years - a lot of them hear about it

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through their kids who suddenly call them up and go Dad your on tv your on the Ali G show (laughing) and their, they suddenly you know achieve this kind of street cred.

TG: So they don't know until then? Like you never...

SBC: No.

TG: ...go back to them and say guess what it was all like candid camera or something?

SBC: No.

TG: They don't find out until someone tells them? (Laughing)

SBC: Yeah. They don't find out until it goes on tv or you know on the film and that you know that is something that I am quite rigorous about is that from the moment they meet me to the moment I leave I am fully in character um you know I don't, didn't want to ever have that kind of hey gotcha moment where they go alright it was a joke. Um, we want it to be kind of a real experience.

# AFFIDAVIT OF CAROL EDWARDS

STATE OF MISSISSIPPI

COUNTY OF Coahoma

THIS DAY personally appeared before me the undersigned authority in and for the aforesaid County and State, CAROL EDWARDS, having been by me first duly sworn upon her oath states as follows:

1. I am above the age of twenty-one (21), not a convicted felon, and competent to testify in this matter.

2. The matters stated herein are based on my personal knowledge.

3. I am a resident citizen of Clarksdale, Coahoma County, Mississippi.

4. I have listened to and transcribed an excerpt of the National Public Radio Interview entitled Talking With the Real Sacha Baron Cohen.

5. The transcript of the of the excerpt of this article is accurate to the best of my knowledge.

6. The audio tape of this article is kept on file at Luckett Tyner Law Firm.

7. The information contained herein is true and accurate to the best of my knowledge, information and belief.

AND FURTHER THE AFFIANT SAYETH NOT.

Carol Edwards

CAROL EDWARDS

SWORN to and subscribed before me this the 25th day of June, 2007.

NOTARY PUBLIC

MY COMMISSION EXPIRES:

MY CO[illegible]LY 13, 2007